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No. 84-1098

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

GENERAL MOTORS CORPORATION,
Petitioner,

v.

LEE M. THOMAS, ACTING ADMINISTRATOR,
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE

With consent of the parties, the National Association of Manufacturers (NAM) files this brief in support of the Petitioner. The NAM is a non-profit voluntary business association incorporated under the laws of the state of New York. The NAM represents approximately 13,500 companies, large and small, located in every state. Further, NAM is affiliated with an additional 158,000 businesses through the Associations Council and the National

Industrial Council. The membership of the NAM represents an estimated 80 percent of all goods manufactured in the United States.

The NAM and its members are affected by the federal regulatory policy process involving virtually all government agencies and departments. Both the NAM and its members often file comments on proposed agency regulations. The Administrative Procedure Act (APA), 5 U.S.C. § 551 *et seq.*, is the statute that governs whether a regulation is legislative or interpretive and prescribes whether public comment is required. The NAM believes that the Court of Appeals for the District of Columbia Circuit has erred in the instant case in its evaluation of the nature of the rule at issue and has misinterpreted the application of a recent Supreme Court decision. We believe there is great precedential risk that this decision will affect all federal district and circuit courts and result in foreclosing participation in the administrative process. Because of the vast and diverse involvement of NAM members nationwide with all government entities, this decision may have an adverse impact on the NAM membership. For this reason, the NAM submits the following arguments to the Court in support of the Petitioner.

SUMMARY OF THE CASE

In March of 1977, the Environmental Protection Agency (EPA) ordered General Motors Corporation (GM) to recall certain automobiles pursuant to its authority under the Clean Air Act. 42 U.S.C. § 7401 *et seq.* Following various administrative activities and negotiations, the EPA in 1980 accepted the recall plan offered by GM in 1977. However, GM indicated that certain automobiles would not now be recalled because they were beyond the five year, 50,000 mile useful life limitation that was required for repairs. On May 22, 1980 EPA adopted as an interpretive rule a "nationally applicable" regulation (45 Fed. Reg. 36396, May 30, 1980) stating that all recall plans must provide:

> . . . that the manufacturer will remedy, at the manufacturer's expense, all properly maintained and used vehicles which experienced nonconformity during their useful lives regardless of their age at the time of repairs.

As this was considered an interpretive rule, it was not published for notice or comment. GM filed for review of the order in the Court of Appeals for the District of Columbia Circuit. Initially GM prevailed and the order was vacated. EPA petitioned for a rehearing *en banc*. In the rehearing EPA prevailed and this petition for certiorari is from the decision on rehearing.

SUMMARY OF THE ARGUMENT

The Court of Appeals for the District of Columbia Circuit has erroneously misapplied the decision of this Court in the case of *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, —— U.S. ——, 104 S. Ct. 2778 (1984). The deference given to the decision of agencies in the *Chevron* case did not contemplate the interpretive rule which is not required to be open for public notice and comment under the Administrative Procedure Act.

Interpretive rules do not create new liabilities or responsibilities. They are merely interpretations of the statutory mission delegated to an agency by Congress. As such, they should not enjoy the judicial deference given to legislative rules.

Finally, if this decision is allowed to stand, there is great precedential potential for other circuit and district courts. The D.C. Circuit has original jurisdiction in many statutes and will apply this decision to future appeals. Also the court may be viewed as the leading circuit in other potential litigation.

ARGUMENT

THIS DECISION MISINTERPRETS THE HOLDING IN *CHEVRON, U.S.A., INC. v. NATURAL RESOURCES DEFENSE COUNCIL, INC.*

The Court of Appeals for the District of Columbia Circuit has relied heavily on the ruling in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, —— U.S. ——, 104 S. Ct. 2778 (1984), in giving exceptional deference to the interpretive rule published by the EPA in May of 1980. We believe that this is a misapplication of the holding by the Supreme Court. In the *Chevron* opinion this Court states that Congress may explicitly direct the administrative agency to pursue a particular action or may implicitly leave the determination to the agency. However, with respect to an implicit delegation, this Court contemplated a regulation with substantive and legislative impact. As such, any regulation would require notice and comment according to the requisites of the APA. This Court held in the *Chevron* case that a court is prohibited from issuing its own construction of a statute when an administrative agency's legislative rule reflects a reasonable interpretation.

> In such a case, a court may not substitute its own construction of statutory provision for a reasonable interpretation made by the administrator of an agency.

—— U.S. at ——, 104 S. Ct. at 2782. It is inconceivable that this decision should be extended to interpretive rules that have not had the benefit of public participation. To allow the extension of judicial deference to such an interpretive rule thwarts the very essence of the APA. It potentially could negate any reasonable challenge of any agency's interpretive ruling with courts applying such an interpretation of *Chevron* to future rules.

The NAM believes that the correct application of the *Chevron* decision would require deference only to sub-

stantive legislative rules that have been published for notice and comment, and would not extend to the interpretive rules of an agency the higher degree of respect that is extended to the legislative rule. To give interpretive rules this deference undermines the very essence of the Administrative Procedure Act that was crafted by Congress in 1946. Rules with substantive impact deserve the participation of affected parties. When an agency endeavors to go beyond the interpretation of statutory mandate via an interpretive rule, the interests of the public are threatened. Judge Bazelon, in a concurring opinion in *Chamber of Commerce v. Occupational Safety and Health Administration*, 636 F.2d 464, 471-72 (D.C. Cir. 1980), who also wrote the reasoned dissent in the instant case, made the following statement regarding the impact of an OSHA effort to achieve legislative regulatory results using an interpretive regulation:

> If left undisturbed by this court, this agency action would wield a significant change in the practices which private employers must follow and in the enforcement steps the agency must take. Under these circumstances, I believe that advance notice and opportunity for public participation are vital if a semblance of democracy is to survive in this regulatory era.

Thus NAM believes that the misinterpretation and application of the *Chevron* decision begs for clarification by this Court.

THE ACTION OF THE EPA IS LEGISLATIVE RATHER THAN INTERPRETIVE

> Divining agency intent is rarely a simple matter, for bureaucratic boilerplate often obscures the true purpose. The administrative agency's own label is indicative but not dispositive; we do not classify a rule as interpretive just because the agency says it is.[1]

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[1] 636 F.2d at 468. See *U.S. Department of Labor v. Kast Metals Corporation* [1984] 12 O.S.H. Cas. (BNA) 1045.

Much of the concern in this case revolves around whether the action by the EPA in May of 1980 was an interpretive rule which does not require notice and comment or whether it constitutes a legislative rule that does require public participation. Many circuits have had to consider this issue, particularly the D.C. Circuit. Again in *Chamber of Commerce* the D.C. Circuit stated:

> A rule is interpretive, rather than legislative, if it is not "issued pursuant to legislatively-delegated power to make rules having the force of law" or if the agency intends the rule to be no more than an expression of its construction of a statute or a rule.

636 F.2d at 468. In this instance, EPA contends that it is merely reciting its interpretation of the pertinent section of the Clean Air Act and has admitted that it is not a rule that relies heavily upon the agency's expertise. In the *Chamber* decision the Court of Appeals for the D.C. Circuit in discussing the intent of interpretive rules, stated that "[s]uch rules only provide a 'clarification of statutory language'" and "the interpreting agency only 'reminds' affected parties of existing duties . . ." 636 F.2d at 469. The EPA interpretive rule is not a mere clarification but in fact imposes new duties. This nationally applicable rule changed a key definition, namely that automobiles must be repaired regardless of their useful life. The majority of the lower court agreed, however, to the EPA's typification of this as interpretive.

The nationally applicable policy that was issued by the EPA in May 1980 does create new responsibilities and is not in keeping with the statutory definition of useful life and the intent of Congress as set forth in the legislative history of the act and the published regulations. This interpretive rule was published six years after regulations promulgated under the Clean Air Act were implemented. It is imperative to consider the circumstances surrounding an interpretive rule to determine how much credence or deference should be accorded the agency.

> However, the degree of respect to be accorded to an agency's statutory interpretation of the limit of its authority varies, depending upon such factors as the interpretation's inherent reasonableness, its consistency with prior precedent, its basis in statutory text and legislative history, and whether it is based on experience or expertise peculiarily within the agency's ken.

Office of Consumers' Council v. Federal Energy Regulatory Commission, 655 F.2d 1132, 1141 (D.C. Cir. 1980).

NAM contends that this EPA policy extends beyond the purview of an interpretive rule and has the attributes of a legislative rule which should have required the agency to provide an opportunity for notice and comment by affected parties.

THIS CASE HAS THE POTENTIAL FOR CONSIDERABLE PRECEDENTIAL EFFECT

Enclosed in this brief is Appendix A which is a compilation of all the statutes over which the U.S. Circuit Court of Appeals for the District of Columbia exercises exclusive jurisdiction. There are 19 statutes that are reviewable only in the D.C. Circuit. This decision does have the potential for great impact on all future decisions involving these specific statutes. Additionally, other circuits, in the wake of this opinion, may well view the Court of Appeals for the D.C. Circuit as the definitive circuit for resolution of issues involving legislative and interpretive rules and follow this Circuit's application of the decision in the *Chevron* case.

Another concern is that this opinion in the D.C. Circuit will encourage other agencies that are reviewable by the D.C. Circuit to circumvent the lengthier legislative rule process and achieve like results by the issuance of an interpretive rule that supposedly only clarifies the agency's statutory interpretation. Additionally, many of the stat-

utes, mandated exclusive jurisdiction in the District of Columbia Circuit, are administered by the respondent, the Environmental Protection Agency. This offers greater impetus to the EPA to continue the use of nationally applicable interpretive rules in areas that have a substantial impact that should merit the scrutiny attendant to the legislative regulation process. The NAM believes that the far reaching effects of this decision in the Court of Appeals for the D.C. Circuit as well as the other federal district and circuit courts demands consideration of this issue by this Court.

CONCLUSION

Based upon the significant issues raised by the D.C. Circuit's interpretation of the decision in the *Chevron* case and the distinctions to be drawn between legislative and interpretive rules, this case warrants review by this Court. As stated above, the NAM believes that the U.S. Court of Appeals for the D.C. Circuit has erroneously applied this Court's decision in the *Chevron* case. Further, we believe that the EPA's nationally applicable regulation is tantamount to a legislative rule that should require notice and comment pursuant to the APA. Finally, because there are numerous statutes over which this Circuit has exclusive jurisdiction, all aspects of this case require careful consideration due to the potential precedential effect it will have in future appeals. The majority opinion in the lower court argues that the public is benefited by the resolution of this case in the EPA's favor and is in keeping with the public policy goals expressed in the Clean Air Act. It is equally as important to the public interest that the requisites of the Administrative Procedure Act be assiduously followed as this affects not only an entity such as the Petitioner but any party that is affected by a Congressionally mandated statute and the regulations issued thereunder. It is only when the agency is truly engaging in interpreting the statute and

is not creating new responsibilities or liabilities that the rule should not require public participation.

A linchpin of our democratic process is that any affected party be allowed to have its voice heard when an agency action has the effect of statutory law and creates new liabilities and responsibilities. Thus, it is essential that the requisites of the Administrative Procedure Act be accorded the respect that Congress intended when the statute was enacted and as it has been interpreted in the ensuing decades.

We respectfully request this Court to grant the petition for a writ of certiorari to review the decision below of the Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX

STATUTORY PROVISIONS UNDER WHICH THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT EXERCISES EXCLUSIVE JURISDICTION

The United States Court of Appeals for the District of Columbia Circuit possesses exclusive jurisdiction to review agency action taken under the following major legislation, pursuant to the specified statutory provisions:

1. Government in the Sunshine Act, 5 U.S.C. § 552b(g).

   Review of agency regulations issued pursuant to this subsection for compliance with the open-meeting requirements of § 552b(b)-(f) and proceedings to require the promulgation of conforming regulations.

2. Alaska Natural Gas Transportation Act of 1976, 15 U.S.C. § 719h(c).

   The United States Court of Appeals for the District of Columbia Circuit, acting as a Special Court, has exclusive jurisdiction over claims alleging that this chapter is invalid or that an action will deny rights under the Constitution or that an action is in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.

3. Federal Energy Administration Act of 1974, 15 U.S.C. § 766(c).

   Challenges to administrative rulemaking of general and national applicability done pursuant to this chapter, unless done pursuant to the Emergency Petroleum Allocation Act of 1973.

4. Automobile Fuel Efficiency Act of 1980, 15 U.S.C. § 2003(b)(3)(E).

   Review of any action by the Secretary of Transportation denying or granting an exemption from the provisions of 15 U.S.C. § 2003(b)(1), which requires separate calculation of fuel economy for automobiles domestically manufactured and automobiles not domestically manufactured.

5. International Claims Settlement Act of 1949, 22 U.S.C. § 1631f(b).

   Claims for the return of Bulgarian, Hungarian, or Rumanian property or proceeds vested in the President's designee that have been denied in whole or in part by that designee.

6. Foreign Service Act of 1980, 22 U.S.C. § 4109(a).

   Action for judicial review of final orders of the Foreign Service Labor Relations Board, except as provided in 22 U.S.C. § 4114(d) (resolution of implementation disputes).

   22 U.S.C. § 4109(b).

   Petitions of the Foreign Service Labor Relations Board for enforcement of orders.

7. Internal Revenue Code of 1954 (as amended), 26 U.S.C. § 7482(b)(1).

   Decisions of the Tax Court not covered by 26 U.S.C. § 7482(b)(1)(A), (B), (C), (D), or (E) describing venue in the courts of appeals may be reviewed by the Court of Appeals for the District of Columbia Circuit.

   26 U.S.C. § 7482(b)(3).

   Decisions of the Tax Court under 26 U.S.C. § 7478 (declaratory judgments relating to status

of certain governmental obligations) may be reviewed only in the United States Court of Appeals for the District of Columbia Circuit.

8. Federal Election Campaign Act Amendments of 1979, 26 U.S.C. § 9011(a).

   Review of any certification, determination, or other action of the Federal Election Commission pursuant to the chapter governing the Presidential Election Campaign Fund.

   26 U.S.C. § 9041(a).

   Review of any action by the Federal Election Commission under the chapter governing the Presidential Primary Matching Payment Account.

9. Federal Mine Safety & Health Act of 1974, 30 U.S.C. § 953(d).

   Any state aggrieved by a decision of the Secretary regarding federal assistance to the states, may file in the United States Court of Appeals for the District of Columbia Circuit to modify or set aside that decision.

10. Safe Drinking Water Act, 42 U.S.C. § 300j-7(a)(1).

    Review of actions of the Environmental Protection Agency in promulgating any national primary drinking water regulation under 42 U.S.C. § 300g-1 (national drinking water regulations), any regulation under 42 U.S.C. § 300g-2(b)(1) (state primary enforcement responsibility; regulations; notice and hearing; publication in Federal Register; applications), any regulation under 42 U.S.C. § 300g-3(c) (notice of owner or operator of public water system to persons served), any regulation for state underground injection control programs

under 42 U.S.C. § 300h, or any general regulation for the administration of this subchapter.

11. Noise Control Act of 1972, 42 U.S.C. § 4915(a).

Any petition for review of an action of the Enviromental Protection Agency in promulgating any standard or regulation under 42 U.S.C. § 4905 (noise emission standards for products distributed in commerce), or 42 U.S.C. § 4916 (railroad noise emission standards), or 42 U.S.C. § 4917 (motor carrier noise emission standards) or any labeling regulation under 42 U.S.C. § 4907 and any petition for review of an action the Federal Aviation Administration in promulgating any standard or regulation under 49 U.S.C. App. § 1431 (control and abatement of aircraft noise and sonic boom).

12. Energy Policy and Conservation Act, 42 U.S.C. § 6384(b).

Actions to enjoin or set aside an order issued under 42 U.S.C. § 6382(a)(1)(B), which authorizes the Comptroller General, by general or special orders, to require any person to submit written answers to interrogatories, or to submit information (books, records or any other information) for the purpose of verifying records of any vertically integrated petroleum company's financial information related to certain activities under 42 U.S.C. § 1381(a)(3) or of any person required to submit energy information to federal agencies under 42 U.S.C. § 6381(a)(1)(B).

13. Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6976(a)(1).

Review of actions of the Environmental Protection Agency in promulgating any regulation or requirement under this Act, which includes principal provisions for the regulation of hazardous wastes.

14. Clean Air Act Amendments of 1970, 42 U.S.C. § 7607(b)(1).

Review of actions by the Environmental Protection Agency in promulgating any national primary or secondary ambient air quality standard, any emission standard or requirement under 42 U.S.C. § 7412 (hazardous air pollutants), any standard of performance or requirement under 42 U.S.C. § 7411 (new stationary sources), any standard under 42 U.S.C. § 7521 (motor vehicle emission and fuel standards) (other than other promulgated under 42 U.S.C. § 7521(b)(1)), any determination under 42 U.S.C. § 7521(b)(5) (waiver for 1981 and 1982 model years of carbon monoxide emission standard for light-duty motor vehicles and engines), any control or prohibition under 42 U.S.C. § 7545 (regulation of fuels), any standard under 42 U.S.C. § 7571 (aircraft emission standards), any rule issued under 42 U.S.C. § 7413 (federal enforcement procedures), 42 U.S.C. § 7419 (primary nonferrous smelter orders), or 42 U.S.C. § 7420 (noncompliance penalty), or any other nationally applicable regulation promulgated, or final action taken, by EPA under this Act.

Additionally, review of actions by EPA under other specifically listed sections, if the Administrator finds and publishes notice that those actions are of nationwide scope or effect.

15. Ocean Thermal Energy Conversion Act of 1980, 42 U.S.C. § 9125.

Review of decisions by the National Oceanic and Atmospheric Administration to issue, transfer, modify, renew, suspend, or terminate a license for an ocean thermal energy conversion facility.

16. Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("Superfund"), 42 U.S.C. § 9613(a).

    Review of any regulation promulgated by the Environmental Protection Agency under this Act, which contains principal regulatory provisions for the cleanup of hazardous waste sites.

17. Outer Continental Shelf Leasing Program, 43 U.S.C. § 1349(c)(1).

    Review of any action of the Secretary of the Interior to approve a leasing program pursuant to 43 U.S.C. § 1344.

18. Merchant Marine Act of 1936, 46 U.S.C. § 1181(b).

    Denials by the Secretary of Transportation of contractor's applications to transfer vessels which are subject to operating-differential subsidy contracts to foreign registry upon default or cancellation by the United States.

19. Communications Act of 1934, 47 U.S.C. § 402(b).

    Appeals of decisions and orders of the FCC in eight categories, including: by any applicant for a construction permit or station license, or for the renewal of modification of any such license, whose application is denied by the Commission; by any party to an application for authority to transfer, assign, or dispose of any such instrument of authorization, or any rights thereunder, whose application is denied by the Commission; by the holder of any construction permit or station license which has been modified or revoked by the Commission; by any person upon whom an order to cease and desist has been served under section 312 of this title; by any other person who is aggrieved or whose interests are adversely affected by any order of the Commission granting or denying any application described in paragraphs (1)-(4) of this subsection.